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9 Attorneys for Respondent

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11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE SOUTHERN DISTRICT OF CALIFORNIA
13

14 **DIMITRI VALLERVEICH TATARINOV,**

15 Petitioner,

16 v.

17 **SUPERIOR COURT OF THE STATE OF
CALIFORNIA, COUNTY OF SAN DIEGO,**

18 Respondent.
19

07cv2033-L (NLS)

**MOTION FOR ENLARGEMENT
OF TIME TO FILE REPLY TO
PETITION FOR WRIT OF
HABEAS CORPUS**

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21 Kevin R. Vienna declares:

22 I am the supervising deputy attorney general assigned to head our federal habeas corpus
23 team. I am requesting an extension of time in which to file our response in this matter for the
24 reasons set forth more fully below. In summary, the deputy to whom this matter should be assigned
25 (and to whom is now assigned the responsibility for preparing a response to Petitioner Tatarinov's
26 related petition now pending in this court, case number 07cv2034-JAH (POR) is out of the office
27 and unavailable to begin work on this matter until after November 26, 2007. As will be shown, both
28 matters are substantially the same and efficiencies will be achieved by assigning them to the same

1 deputy, who has worked on the case in the past, Ms. Lane-Erwin.

2 Moreover, upon my initial examination of the Petition, it appears to suffer from serious
3 procedural defects, which may well deprive this Court of jurisdiction.

4 Accordingly, I request this extension of time of one month to December 31, 2006, in which
5 to file our response.

6 **A. Background**

7 This matter was brought to my attention on November 7, 2007, when this office processed
8 this Court's Order Setting Briefing Schedule for assignment to a deputy attorney general who would
9 be responsible for preparing a response. It became apparent that Petitioner Tatarinov had filed two
10 separate petitions in this Court on October 19, 2007. This matter was assigned case number
11 07cv2033-L (NLS) (hereinafter case 2033), the other matter was assigned case number 07cv2034
12 JAH (POR) (hereinafter case 2034). Case 2034 had been processed in this office a few days earlier,
13 and it was assigned to Deputy Attorney General Sabrina Y. Lane-Erwin for preparation of a
14 response. The matter was assigned to her because she had earlier handled a direct appeal involving
15 Petitioner and had some familiarity with his circumstances. She filed a motion for an extension of
16 time in which to file our response in case 2034, because we did not yet have access to underlying
17 state records and because of a pre-paid vacation. (*See* Ex. A (motion).)

18 The next day, I became aware of the second case, now before this Court, case number
19 2033. I reviewed the files of case numbers 2033 and 2034. It appears that we ordered the relevant
20 state records on November 2, 2007, to begin work on case number 2034.

21 In case number 2034, Tatarinov challenges a 1996 conviction in San Diego Superior Court
22 for the crime of robbery. The essence of that claim is that he received ineffective assistance of
23 counsel, who failed to file a timely brief on appeal, resulting in dismissal. Tatarinov filed a habeas
24 corpus petition in this Court, challenging that underlying judgment, in 2002, in case number
25 02cv2029-W (BEN). Ultimately, that petition was dismissed as untimely, and a subsequent appeal
26 was denied by the United States Court of Appeal for the Ninth Circuit, case number 03-56342.

27 For the Petition now pending before this Court, number 2033, Tatarinov challenges a 1998
28 conviction in San Diego Superior Court for petty theft with a prior theft related offense. Tatarinov

1 pled guilty to the crime and was sentenced to thirty-four days of custody and five years of felony
2 probation. There is nothing in the Petition or in the records to which I now have access to suggest
3 that Tatarinov ever appealed this judgment or sought any relief in the state courts until 2006. (*See*
4 *Pet.* at 5.) In this Petition, Tatarinov claims ineffective assistance of counsel – the same counsel who
5 failed to file the appeal in the robbery case. The essence of the new claim seems to be that counsel's
6 failure to complete the appeal in the robbery case created a conflict that prevented effective
7 representation in the later petty theft case. (*Pet.* at 6.)

8 Case number 2034 differs from case number 2033 in one important way; since there
9 already has been a federal habeas corpus addressing the same state judgment, that petition appears
10 to be an improperly filed second or successive petition.

11 Otherwise, case numbers 2033 and 2034 seem to share some similar issues, including:

- 12 1. Both petitions name as the Respondent the Superior Court of the State of California,
13 County of San Diego. But, as the Petition indicates, Tatarinov has "completed the
14 California state sentencing imposed upon him" (*Pet.* at 2.) I interpret this to be a
15 concession that Tatarinov is no longer in physical custody, on parole, or on probation.
16 This raises two issues: (1) Tatarinov appears to have named an incorrect respondent, *see*
17 *Smith v. State of Idaho*, 392 F.3d 350, 354 (9th Cir. 2004) (A petition is subject to
18 dismissal for failure to name an appropriate respondent); *Stanley v. California Supreme*
19 *Court*, 21 F.3d 359, 360 (9th Cir. 1994) (the proper respondent is the state officer currently
20 having custody); and (2) Tatarinov appears no longer to be in the custody of any state
21 official, a jurisdictional prerequisite for habeas corpus relief, *Maleng v. Cook*, 490 U.S.
22 488, 490-91, 109 S. Ct. 1923, 104 L. Ed. 2d 540 (1989); *see DeLong v. Hennessey*, 912
23 F.2d 1144, 1146 (9th Cir. 1990) (A petitioner who has fully served his sentence and who
24 is not subject to court supervision is not in custody within the meaning of section 2254);
25 2. Both petitions appear to be untimely – that is, not filed within the one-year statute of
26 limitations;
27 3. Both petitions, in their captions, suggest that the petition is filed under the jurisdictional
28 authority of 28 U.S.C. § 2241, but the proper jurisdictional basis is 28 U.S.C. § 2254.

1 *White v. Lambert*, 370 F.3d 1002, 1004 (9th Cir 2004) (§ 2254 is the proper jurisdictional
2 basis for a state prisoner who claims to be unlawfully in state custody pursuant to a state
3 judgment).

4 Because of these related issues, I believe these two matters are best handled by the same
5 deputy attorney general. Ms. Lane-Erwin represented the State in Tatarinov's 2006 appeal of a state
6 court's denial of his late attempt to obtain a new trial in the robbery case, so she possesses the most
7 familiarity with Tatarinov and the issues he raises. Moreover, current workloads in the office would
8 prevent any deputy from commencing work on this new project in less time than that, unless they
9 were to place this matter ahead of matters for which this Court and other courts have previously
10 issued orders to respond.

11 As Ms. Lane-Erwin stated in her declaration requesting an extension of time in case 2034,
12 we are seeking necessary state-court records to permit filing a proper response. Accordingly, I am
13 asking the Court to grant an extension of time of one month within which to prepare our response.

14 Granting of an enlargement of time will permit the response to be prepared without
15 impairing quality and will afford adequate time to obtain and copy necessary records, for review and
16 processing in this office, and for filing in this Court. All extension requests and progress are
17 monitored by the senior assistant attorney general in charge of this office.

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1 I declare under penalty of perjury under the laws of the United States of America that the
2 foregoing is true and correct.

3 Dated: November 8, 2007

4 Respectfully submitted,

5 EDMUND G. BROWN JR.
Attorney General of the State of California

6 DANE R. GILLETTE
Chief Assistant Attorney General

7 GARY W. SCHONS
8 Senior Assistant Attorney General

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10 s/Kevin Vienna
11 KEVIN VIENNA
Supervising Deputy Attorney General
12 Attorneys for Respondent

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EXHIBIT A

1 EDMUND G. BROWN JR.
Attorney General of the State of California
2 DANE R. GILLETTE
Chief Assistant Attorney General
3 GARY W. SCHONS
Senior Assistant Attorney General
4 BARRY CARLTON
Supervising Deputy Attorney General
5 SABRINA Y. LANE-ERWIN, State Bar No. 167819
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10 Attorneys for Respondent

11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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14 **DMITRI VALLERVEICH TATARINOV,**

Petitioner,

15
16 v.

17 **SUPERIOR COURT OF THE STATE OF
18 CALIFORNIA, COUNTY OF SAN DIEGO,**

19 Respondents.
20

07cv2034 JAH (POR)

**MOTION FOR
ENLARGEMENT OF TIME
TO FILE RESPONDENT'S
RETURN**

21 Respondent respectfully requests a 30-day enlargement of time to file Respondent's return
22 in the above-entitled matter. The return is due on November 26, 2007. This is Respondent's first
23 request for an enlargement of time in this matter. It is based upon the following declaration:

24 I, SABRINA Y. LANE-ERWIN, declare under penalty of perjury under the laws of the
25 Unites States of America that the following is true and correct:

26 1. I am the Deputy Attorney General assigned to handle all pleadings in the above-entitled
27 matter.

28 2. Petitioner is not currently imprisoned or on parole or probation.

1 3. My office has ordered the state court files and records that are necessary to prepare a
2 response in this matter. I have not yet received them. I am leaving tomorrow for a pre-paid, out of
3 state vacation and will return on November 26, 2007. I have taken one vacation day in the past
4 seven months and do not have another vacation planned for the following six months. Thus, I am
5 requesting a 30-day enlargement of time.

6
7 Dated: November 6, 2007

8 Respectfully submitted,

9 EDMUND G. BROWN JR.
10 Attorney General of the State of California

11 DANE R. GILLETTE
12 Chief Assistant Attorney General

13 GARY W. SCHONS
14 Senior Assistant Attorney General

15 BARRY CARLTON
16 Supervising Deputy Attorney General

17 s\ Sabrina Y. Lane-Erwin
18 SABRINA Y. LANE-ERWIN
19 Deputy Attorney General
20 Attorneys for Respondent

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Tatarinov v. Superior Court of San Diego**

No.: **07cv2034 JAH (POR)**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On November 6, 2007, I served the attached **motion for enlargement of time to file respondent's return and order granting enlargement of time to file respondent's return** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West "A" Street, Suite 1100, San Diego, California 92101, addressed as follows:

**Patricia Lynn Jacks
5790 Friars Rd. F8
San Diego CA 92110**

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 6, 2007, at San Diego, California.

Kimberly Wickenhagen

Declarant


Signature

CERTIFICATE OF SERVICE

Case Name: **Tatarinov v. Superior Court**

No.: **07cv2033-L (NLS)**

I declare:

On November 8, 2007, I electronically filed the following document(s):

**MOTION FOR ENLARGEMENT OF TIME TO FILE REPLY TO PETITION
FOR WRIT OF HABEAS CORPUS**

Electronic Mail Notice List

I have caused the above-mentioned document(s) to be electronically served on the following person(s), who are currently on the list to receive e-mail notices for this case:

Patricia Lynn Jacks
E-mail Address: pjacks@san.rr.com
Attorney for Dimitro Tatarinov

Manual Notice List

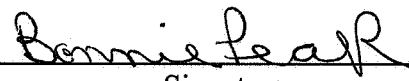
The following are those who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing):

NONE

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 8, 2007, at San Diego, California.

Bonnie Peak

Declarant



Signature

SD2007701085

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